BRITISH COLUMBIA

OPINION

OF THE CONFLICT OF INTEREST COMMISIONER PURSUANT TO SECTION 19(1) OF THE *MEMBERS' CONFLICT OF INTEREST ACT*

IN THE MATTER OF AN APPLICATION BY JOHN HORGAN, MLA FOR MALAHAT-JUAN DE FUCA, WITH RESPECT TO ALLEGED CONTRAVENTIONS OF PROVISIONS OF THE *MEMBERS' CONFLICT OF INTEREST ACT* BY THE HONOURABLE GORDON CAMPBELL, MLA FOR VANCOUVER-POINT GREY, PREMIER OF BRITISH COLUMBIA

City of Victoria
Province of British Columbia

February 5, 2007

Office of the Conflict of Interest Commissioner

The Honourable H.A.D. Oliver, Q.C.
Commissioner

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IN THE MATTER OF AN APPLICATION BY JOHN HORGAN, MLA FOR MALAHAT-JUAN DE FUCA, WITH RESPECT TO ALLEGED CONTRAVENTIONS OF PROVISIONS OF THE *MEMBERS' CONFLICT OF INTEREST ACT* BY THE HONOURABLE GORDON CAMPBELL, MLA FOR VANCOUVER-POINT GREY, PREMIER OF BRITISH COLUMBIA

John Horgan, Member of the Legislative Assembly for Malahat-Juan de Fuca, wrote to me on January 26, 2007, in the following terms:

> "I am writing to request that you provide an opinion respecting the compliance of the MLA for Vancouver-Point Grey pursuant to section 18 of the *Members' Conflict of Interest Act* (the "Act").
>
> The basis for this request rests in part on the following facts:
>
> The MLA for Vancouver-Point Grey declared on his December 1, 2006, Statement of Disclosure his possession of a Trust Plan administered by Plan Trustee Canaccord Capital. The Statement of Disclosure lists common shares held inside the plan, including shares in Alcan Inc.
>
> On November 10, 2006, the MLA for Vancouver-Point Grey in his capacity as Premier signed an Order-in-Council approving the agreement with Alcan Inc. under the provisions of sections 1 and 2 of the *Industrial Development Act*. The B.C. Utilities Commission ruled in December that the deal was not in the public interest and not enforceable.
>
> Discussion
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> The *Members' Conflict of Interest Act* defines a conflict of interest as follows:
>
> > 2 (1) For the purposes of this Act, a member has a conflict of interest when the member exercises an official power or performs an official duty or function in the execution of his or her office and at the same time knows that in the performance of the duty or function or in the exercise of the power there is the opportunity to further his or her private interest.
> >
> > (2) For the purposes of this Act, a member has an apparent conflict of interest if there is a reasonable perception, which a reasonably well informed person could properly have, that the member's ability to exercise

> an official power or perform an official duty or function must have been affected by his or her private interest.

Section 3 of the Act states that:

> 3 A member must not exercise an official power or perform an official duty or function if the member has a conflict of interest or an apparent conflict of interest.

On August 15, 2006, you issued a Commissioner's Directive for Members of the Legislative Assembly where you stated that: "an investment in an open-ended mutual fund that has broadly based investments not limited to one industry or one sector of the economy need not be listed in Members' confidential disclosure statements" because "no conflict of interest can reasonably be expected to arise from their ownership."

I draw your attention to the fact the MLA for Vancouver-Point Grey did not hold shares in Alcan Inc. through a mutual fund but in a Trust Plan. While Members' Disclosure Statements in general do not list shares held through mutual funds, the Member for Vancouver-Point Grey's Disclosure Statements lists the bonds and common shares held in the Trust Plan on behalf of the Member, demonstrating his awareness of owning shares in Alcan Inc. at some point before filing on December 1, 2006.

I believe that more information is required to determine when the Premier was aware specifically that he owned shares in Alcan Inc., and what he did to prevent a conflict of interest or a perceived conflict of interest once he was informed of that fact. Did he, for example, recuse himself from any discussion of the Alcan agreement or the appeal of the BCUC decision?

As well, I believe that more information is required to determine the Premier's ability to obtain knowledge of assets he holds in general. While the Premier has asserted that the fund is managed at the discretion of Canaccord Capital and that he has no input into decisions to buy and sell, it is apparent that he is able to obtain information regarding assets held and disposition of assets in that fund simply by "checking", as he himself stated when revealing to media that the shares in Alcan were sold January 10th (Global TV Broadcast January 26th).

Conclusion

I believe there are three fundamental questions to be answered:

1. How and when was the Premier made aware of his ownership of Alcan shares through the trust controlled by Canaccord Capital?

2. Once in possession of that knowledge, what steps did the Premier take to ensure there was neither a conflict of interest nor a possible perceived conflict of interest?

3. Is the Premier's current arrangement with Canaccord Capital as manager of this trust appropriately structured to ensure the Premier does not have knowledge of assets in his possession that may put him in a possible conflict of interest or perceived conflict of interest?

I attach for your reference the MLA for Vancouver-Point Grey's Disclosure Statement for December 1, 2006, an Order-in-Council regarding the Alcan deal dated November 10, 2006, signed by the Premier, and your Commissioner's Directive of August 15, 2006."

Although the complainant has asked me to provide an opinion pursuant to section 18(1) of the *Members' Conflict of Interest Act*, I am satisfied that this matter can more appropriately be dealt with pursuant to section 19(1) of the Act, which reads as follows:

> 19 (1) A member who has reasonable and probable grounds to believe that another member is in contravention of this Act or of section 25 of the *Constitution Act* may, by application in writing setting out the grounds for the belief and the nature of the contravention alleged, request that the commissioner give an opinion respecting the compliance of the other member with the provisions of this Act.

SUMMARY OF DISCLOSURE OBLIGATION

Every Member of the Legislature must annually file with the Commissioner a confidential disclosure statement in the form prescribed by the Regulations containing a statement of the nature of the assets, liabilities, and financial interests of the Member, the Member's spouse and minor children and private corporations controlled by any of them.

After filing a disclosure statement, the Member…must meet with the Commissioner (the "Statutory Meeting") to ensure that adequate disclosure has been made and to obtain advice from the Commissioner on the Member's obligations under this Act, and the Commissioner may recommend the manner by which the Member will comply with those obligations.

After meeting with the Member, the Commissioner prepares a Public Disclosure Statement containing all relevant information provided by the Member, which is then filed with the Clerk of the Legislative Assembly and made available for public inspection.

One of the assets disclosed by the Honourable Gordon Campbell was the Independence Canadian Equity Portfolio operated by Canaccord.

THE EQUITY PORTFOLIO

Such investment portfolios are designed for investors who want a hands-off approach to their investment strategy. The Independence Canadian Equity Portfolio is a managed portfolio invested with the objective of long-term growth in high quality blue chip Canadian equities with a maximum weighting in any one stock of approximately 5%. The decision to buy or sell any particular stock rests with the Chief Portfolio Manager without reference to or input by individual stock holders. Such funds differ from mutual funds where investors buy units of pooled equities.

HISTORY

In preparing Premier Campbell's confidential disclosure statement, his office obtained a detailed listing of the common shares which formed part of the managed portfolio. The confidential disclosure statement was filed with my office on September 15, 2006. It was pointed out in discussion by the Premier's Executive Assistant that the shares listed were in fact part of the managed portfolio and that she would not normally list these individually since the portfolio contents change from day-to-day. The Commissioner suggested that the list be left as filed until his statutory interview with the Premier by which time a draft replacement list would have been obtained and it would be decided whether to amend the list supplied with the confidential disclosure statement or to replace it with the up-to-date list available at the time of the statutory meeting.

The list submitted on September 15, 2006 with the confidential disclosure statement did not list any Alcan shares but listed, among numerous stocks and shares in the managed portfolio, an item described as "ALCON INCE". In subsequent discussion between my staff and that of Premier Campbell around the end of October it was realized that this was a typographical error and should have appeared as "ALCAN INC.". It was further indicated that there had been additional trades in other shares since the filing of the confidential disclosure statement in September and that further material would have to be filed on the Premier's behalf to reflect these changes and the matters discussed with the Commissioner at the Premier's statutory meeting with the Commissioner on October 5, 2006.

Following the statutory meeting, the office of the Conflict of Interest Commissioner prepared a draft public disclosure statement which was sent to the Premier's office for approval – it was during the approval process that the Premier's Executive Assistant became aware of the "ALCON INCE" typo – this was discussed with staff members at the office of the Conflict of Interest Commissioner and our attention was drawn to the fact that there had been additional trades within the fund and that the Premier's office would have to re-file in order to bring the Public Disclosure Statement up-to-date reflecting recent trades and correcting the earlier typographical error.

The office of the Conflict of Interest Commissioner had prepared the original list of holdings based on the earlier – and erroneous – list submitted as part of the Confidential Disclosure Statement (filed in September) and the Premier's office was anxious to have the Premier sign a corrected and up-to-date Statement prior to the Premier's departure for China on a two-week Trade Mission.

On November 15, 2006, the Commissioner received a note from Premier Campbell's Executive Assistant dated November 10, 2006 that there had been changes in the investment portfolio and submitted a Statement of Material Change, signed by Premier Campbell, and showing November 10, 2006 as the date of filing. This notice showed certain acquisitions and disposals, including Alcan Inc. acquired on November 2, 2006 by Premier Campbell's spouse. Final

Public Disclosure Statements were filed during the week of November 27th following the Premier's return from Asia.

THE ALCAN / HYDRO DEVELOPMENT AGREEMENT

This Agreement was negotiated over a period of months. The Executive Council Members primarily responsible were Hon. Colin Hansen, Minister of Economic Development and Minister responsible for the Asia Pacific Initiative and the Olympics and Hon. Richard Neufeld, Minister of Energy, Mines and Petroleum Resources. Premier Campbell was not involved in any direct negotiation. In August 2006, a public announcement of the Agreement was made.

THE ORDER IN COUNCIL

An Order in Council was drafted on October 2, 2006 and considered in Cabinet on October 19, 2006 as well as a Treasury Board minute of October 12, 2006. Minister Hansen was directed that a formal letter from Alcan approving the Agreement would be needed before an Order in Council could be submitted to the Lieutenant Governor. The OIC was signed at that time by Minister Hansen and the Premier to be held until the Alcan letter of approval had been received and was then submitted on November 10, 2006 to the Administrator for signature.

ALCAN SHARES

These were acquired by the portfolio managers as part of their regular discretionary trading probably during 2006. Some were bought and then sold at a slight loss – others were bought at other times and realized a modest profit. None of these transactions were made at the request of Premier Campbell – he neither knew of the purchases or of the sales or of the fact that the portfolio managers were holding Alcan shares among the many other stocks in the managed portfolio. The maximum number of Alcan shares held in the managed portfolio at any time probably did not exceed 80.

KNOWLEDGE OF OWNERSHIP OF ALCAN SHARES

The shares were acquired by the portfolio managers of Independence Canadian Equity Portfolio as part of Campbell's RRSP fund. The Independence Canadian Equity Portfolio was a managed portfolio with discretion to the managers to make purchases and sales without input by the stockholder and without individual trades being reported to the stockholder. Premier Campbell was not aware of any Alcan holdings until either the 10th or the 27th of November, 2006. On January 25, 2007 he became aware of media reports relating to Alcan shares and on enquiry learned that they had already been sold by the portfolio managers on or about January 11, 2007.

JOHN HORGAN OPINION REQUEST

I now wish to address Mr. Horgan's three fundamental questions.

1. How and when was the Premier made aware of his ownership of Alcan shares through the trust controlled by Canaccord Capital?

The Premier became aware of the presence of Alcan shares in his managed portfolio either on November 10, 2006 (on the eve of his departure for China) or immediately following his return from China on (or after) November 27, 2006.

2. Once in possession of that knowledge, what steps did the Premier take to ensure there was neither a conflict of interest nor a possible perceived conflict of interest?

I believe Mr. Horgan bases this question on my Ethics Bulletin #4 dated January 4, 2007 and on the sample letter of instructions attached to it.

The Bulletin has reference to the conduct of MLAs who find themselves in a conflict position when present at a meeting of the Legislative Assembly or Executive Council or a committee of either of them. Where, as in this case, the Member is unaware of an investment made for him by a discretionary investment manager, it cannot be said that, in the words of section 10 of the *Members' Conflict of Interest Act* he "has reasonable

grounds to believe that he…has a conflict of interest." The sample letter of instructions reads as follows:

CONFLICT OF INTEREST DIRECTIVE

Memorandum

Date:

To: AB
Deputy Minister of X

From: The Honourable YZ
Minister of X

Re: Conflict of interest

My obligations under the *Members' Conflict of Interest Act* require me to refrain from having ministerial dealings with matters that may be seen as involving or benefiting W, F or S.

To ensure that there will be no breach of the Act, I am directing you, as my Deputy Minister, to ensure that I have no involvement in the matters referred to above. If issues arise with respect to these companies you should deal with those issues at the bureaucratic level. However, if they cannot be dealt with at that level because they require the exercise of ministerial discretion, they must be brought to the attention of one of my backup ministers for decision. I must not be briefed on their decision until after their decision has been made.

If issues arise with respect to those companies that require consideration by Cabinet, or a Cabinet Committee of which I am a member, I am directing you to advise me well in advance of any meetings where the issues will be discussed. I am to be informed of the fact that the issue is on the agenda. I must not be briefed on any of the details until after a decision is made.

Please ensure that this Directive is brought to the attention of appropriate staff members.

Minister of X

In the present instance, there was no reason to suppose that the question of the Project Agreement between Alcan and BC Hydro was likely to be revived whilst the Premier held Alcan stock (especially after the quashing of the Project Agreement on December 29, 2006 by the Public Utilities Commission) and there would seem to be little point in sending out a customary letter of instructions in the circumstances.

3. Is the Premier's current arrangement with Canaccord Capital as manager of this trust appropriately structured to ensure the Premier does not have knowledge of assets in his possession that may put him in a possible conflict of interest or perceived conflict of interest?

The Premier has, out of an abundance of caution and on his own initiative, given instructions to discontinue the present investment arrangement in the Independence Canadian Equity Portfolio following a discussion with the Commissioner.

There is, in my view, nothing which makes an investment by a Member of the Legislative Assembly or of Executive Council in a managed discretionary portfolio such as the one in this case, improper or contrary to the *Members' Conflict of Interest Act* but the Premier feels – and I agree – that it may lay the investor open to the possibility of allegations of conflict of interest or of apparent conflict which, once investigated are likely to be found unsubstantiated.

OPINION

It will be clear from my responses to the questions raised by Mr. Horgan that I find no breach of the provisions of the *Members' Conflict of Interest Act* nor any improper conduct on the part of the Honourable Gordon Campbell, MLA, Premier of British Columbia.

I am, nevertheless, grateful to Mr. John Horgan, MLA for having raised this issue which has enabled me to examine the distinction between an open-ended mutual fund (as described in my Commissioner's Directive of August 15, 2006) and a managed discretionary portfolio which I believe, though proper and lawful, may expose Members to allegations of apparent conflict as defined by section 2(2) of the *Members' Conflict of Interest Act* as follows:

> 2 (2) For the purposes of this Act, a member has an apparent conflict of interest if there is a reasonable perception, which a reasonably well informed person could properly have, that the member's ability to exercise an official power or perform an official duty or function must have been affected by his or her private interest.

A distinction must be made between a reasonably well informed person – that is one who has familiarized himself or herself with the facts – and one who is suspicious by nature of the integrity of those in political life. Suspicion is no substitute for reasonable perception. I believe that Members would be wise to avoid exposing themselves to attack on the basis of involvement in a form of investment which could give rise to unwarranted attack.

There are several Canadian jurisdictions which prohibit Ministers from owning stocks and shares (except in specified circumstances). I do not embrace such draconian measures but I do wish to encourage Ministers and other office holders to consider the wisdom of investing in non self-directed mutual funds (as described in Commissioner's Directive of August 15, 2006) or alternatively in placing their investments in a blind trust.

Dated this 5th day of February, 2007

H.A.D. Oliver, Q.C.
Conflict of Interest Commissioner